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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-920

BERNARD W. McNAMARA, *et al.*,

Petitioners,

v.

ROBERT JOHNSTON, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the opinion and judgement of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 16, 1975.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, which is reported at 522 F.2d 1157, is printed in Appendix B.

JURISDICTION

The opinion and judgement of the United States Court of Appeals for the Seventh Circuit was entered on September 16, 1975. By Order of this Court dated December 1, 1975 petitioners' time for filing a petition for a writ of certiorari was extended to December 29, 1975. Jurisdiction of this Court is invoked under 28 USC section 1254(1).

QUESTIONS PRESENTED

Does the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, deprive the federal courts of jurisdiction under section 501(b) of the Labor Management Reporting and Disclosure Act, 29 USC section 501(b), to provide relief to rank and file union members to prevent unlawful diversion of union funds into election campaigns of candidates for federal office?

Are union officers relieved of their fiduciary duty to provide an accounting to the union members for union funds expended for illegal election campaign contributions by reason of general clauses in the union's constitution or convention proceedings which purport to authorize the illegal election campaign contributions?

STATUTES INVOLVED

This case involves interpretation of section 501(b) of the Labor Management Reporting and Disclosure Act of

1959, 29 U.S.C. section 501(b), (hereinafter LMRDA), and the Federal Corrupt Practices Act, 18 U.S.C. section 610, as amended by the Federal Election Campaign Act Amendments, Pub. L. 93-443. Pertinent portions of these statutes are reprinted in Appendix A.

STATEMENT OF THE CASE

Plaintiffs, rank and file members of Local 558 of the United Auto Workers Union (UAW), are employed as production unit workers in a General Motors Corporation plant at Willow Springs, Illinois. Defendants are officers of the UAW or its subordinate bodies. Plaintiffs, under a compulsory union shop agreement, must pay monthly membership dues to UAW. The UAW constitution, as augmented by administrative instructions issued by the president of UAW International, requires that all local unions in Illinois, including Local 558, set aside a minimum of three percent of each member's monthly membership dues as a per capita payment to the UAW Illinois State Community Action Program (CAP). The complaint alleged that the CAP funds have been and are being used for the purpose of making campaign contributions to candidates for federal office, and for support of various radical groups and causes.

On May 6, 1969, a majority of the members of Local 558 adopted by referendum vote a resolution objecting to the use of their dues money to support political candidates and radical organizations. Formal notice of the resolution was given to the defendant UAW officers, but they continued, despite the objections of the

members, to expend union money for campaign contributions to candidates for federal elections, and for support of various ideological causes.

After requesting the executive officers of Local 558 to bring legal proceedings, and receiving no satisfaction, plaintiffs brought this action in March 1971 asserting federal jurisdiction under section 501(b) of the LMRDA. Their complaint alleged that the defendant officers breached their fiduciary duty imposed by section 501(a) of the Act, 29 U.S.C. section 501(a), and requested that the defendant officers be required to account for CAP funds received and expended by them. The prayer for relief also asked that defendants be enjoined from continuing to divert union dues money into political campaigns, and that damages be recovered on behalf of the union for such monies unlawfully spent.

The UAW International moved to intervene, to provide counsel for the defendant officers, and to dismiss the complaint. The district court granted the motion to intervene and dismissed the complaint for failure to state a claim. (360 F.Supp. 519 N.D. Ill. 1973). The dismissal was appealed to the Seventh Circuit Court of Appeals, which affirmed the lower court's decision.

The Court of Appeals held that the Federal Election Campaign Act Amendments of 1974 vest the Federal Election Commission with primary jurisdiction with respect to the civil enforcement of 18 U.S.C. section 610 after January 1, 1975, and hence "requires dismissal of plaintiff's complaint for lack of federal jurisdiction in the district courts insofar as it requests that defendants be enjoined from contributing CAP funds to political campaigns for federal office under

circumstances that allegedly violate the Federal Corrupt Practices Act, 18 U.S.C. section 610". 522 F.2d at 1161.

The Court of Appeals further held that the defendant union officers may not be charged with a breach of their fiduciary duty if their expenditure of union funds for federal election campaign contributions was sanctioned by the union constitution or convention actions. In this connection the court cited the provisions in Articles 2 and 23 of the UAW constitution reciting that among the objectives of the UAW are:

> "... to vote and work for the election of candidates and the passage of improved legislation in the interests of all labor." (Art. 2, § 4)
>
> "To engage in legislative, political, educational, civic, welfare and other activities which further, directly or indirectly, the joint interest of the membership of this organization in the improvement of general economic and social conditions in the United States of America, Canada, and generally in nations of the world." (Art. 2, § 5).

and that:

> "The UAW Community Action Program (CAP) shall engage in community, civic, welfare, educational, environmental, cultural, citizenship-legislative, consumer protection, community services and other activities to improve the economic and social conditions of UAW members and their families ..." (Art. 23, § 1).

The court disregarded plaintiffs' contention that the cited provisions of the UAW constitution do not expressly authorize use of union funds for political campaign contributions to federal candidates, and if they were intended to do so in violation of 18 U.S.C.

section 610 are void as against public policy. The court held that "despite the alleged illegality of certain CAP expenditures, so long as the expenditures were authorized in some fashion, plaintiffs can have no cause of action on behalf of the union for breach of fiduciary duty". 522 F.2d at 1166.

The Court of Appeals attempted to distinguish the present case from *United States v. Boyle*, 482 F.2d 755 (D.C. Cir. 1973), cert. denied 414 U.S. 1076, 38 L.Ed.2d 438, in which the Court of Appeals for the District of Columbia Circuit held that neither an authorization by the union's governing body nor a general grant of power under the union's constitution excused a union officer from responsibility for making illegal political campaign contributions. The Court of Appeals also refused to follow *Anderson v. Vestal*, 79 LRRM 2755 (M.D. Tenn. 1971), in which a union officer was held to have violated his fiduciary duty under the LMRDA by making illegal expenditures from union funds for a federal election campaign. In making these distinctions the Court of Appeals stated:

> "Boyle was a criminal prosecution brought under 18 U.S.C. § 610 and 29 U.S.C. § 501(c), and evidence that the union authorized the defendant's violation of the law was irrelevant. In the instant case where the plaintiffs purport to represent the union membership in a civil action for breach of fiduciary duty such a showing is a complete defense. While *Anderson* was a civil case brought on behalf of the union under § 501 and the union officers were charged with spending union funds in violation of § 610, there was no showing there, unlike the present case, that the expenditures were authorized by some union resolution or policy." 522 F.2d at 1165, fn. 10.

On these grounds the Court of Appeals affirmed the district court's order dismissing plaintiff's action, thereby denying them the accounting and other relief to which they are expressly entitled under 501(b) of the LMRDA.

REASONS FOR GRANTING WRIT

I.

THE QUESTION OF WHETHER JURISDICTION UNDER SECTION 501(b) OF THE LMRDA TO ENJOIN VIOLATIONS OF FIDUCIARY DUTIES BY UNION OFFICERS HAS BEEN SUPERCEDED BY THE FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1974 IS AN IMPORTANT QUESTION OF LAW WHICH SHOULD BE SETTLED BY THIS COURT.

Section 501(b) of the LMRDA expressly establishes jurisdiction in the federal district courts to entertain suits by union members to secure an accounting by union officers respecting their use of union funds, authorizes issuance of injunctions to restrain continued violations of the union officers' fiduciary duties, and provides for recovery of damages for the benefit of the union and its members. Plaintiffs' Complaint in the present action asserted jurisdiction under section 501(b).

Although there is nothing in the Federal Election Campaign Act Amendments of 1974 which indicates any congressional intent to revoke or curtail the statutory grant of jurisdiction for suits by union

members under section 501(b) of the LMRDA, the Court of Appeals, in affirming the dismissal of the complaint for lack of jurisdiction, stated:

> "We have concluded that the Campaign Act Amendments require the dismissal of plaintiffs' complaint for lack of federal jurisdiction in so far as it requests that defendants be enjoined from contributing CAP funds to political campaigns for federal office under circumstances that allegedly violate the Federal Corrupt Practices Act, 18 U.S.C. section 610." 522 F.2d. at 1161.

In reaching this conclusion the Court of Appeals cited the decision of this Court in *Cort v. Ash* 422 U.S. 66 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), and stated:

> "We are aware that the instant case differs from *Cort* in that we are dealing with a labor organization, not a corporation, and that we are asked to construe a statute, not to imply a cause of action, but we nevertheless reach the same result. Both the language and the legislative history of the Campaign Act Amendments indicate that Congress intended the statutory remedy before the Commission to govern all allegations of this type in future federal elections." 527 F.2d. at 1162.

A reading of this Court's decision in *Cort v. Ash* does not support the conclusion reached by the Court of Appeals. In that case Ash, a corporate stockholder, brought a stockholders derivative suit asserting an implied private cause of action for injunctive relief and damages to remedy alleged violations by corporate management of 18 U.S.C. section 610 in connection with the 1972 presidential election. The Circuit Court of Appeals for the Third Circuit had held that the stockholder had an implied cause of action to secure

the requested relief, but this Court concluded that there was no private remedy the stockholder could exercise under that statute because the legislative history of the Corrupt Practices Act "... demonstrates that the protection of ordinary stockholders was at best a secondary concern". 45 L.Ed.2d. at 38. This Court went on, however, to note that the situation of a corporate shareholder is substantially different from that of a union member, and commented that:

> "... We note that Congress did show concern, in permanently expanding § 610 to unions, with protecting union members from use of their funds for political purposes. See *United States v. CIO*, supra, 335 U.S., at 135, 142 (Rutledge, J., concurring). This difference in emphasis may reflect a recognition that, while a stockholder acquires his stock voluntarily and is free to dispose of it, union membership and the payment of union dues is often involuntary because of union security and check-off provisions. Cf. *Machinists v. Street*, 367 U.S. 740 (1960). It is therefore arguable that the federal interest in the relationship between members and their unions is much greater than the parallel interest in the relationship between stockholders and state-created corporations. In fact, the permanent expansion of § 610 to include labor unions was part of comprehensive labor legislation, the Taft-Hartly Act of 1947, while the 1907 Act dealt with corporations only with regard to their impact on federal elections. We intimate no view whether our conclusion that § 610 did not give rise directly to a cause of action for damages in favor of stockholders in state-created corporations necessarily would imply that union members, despite the much stronger federal interest in unions, are also relegated to state remedies." 45 L.Ed.2d. at 38, fn. 13.

It should be noted that plaintiffs here are not asserting any implied private cause of action to enforce 18 U.S.C. section 610. Their action seeks relief under 29 U.S.C. section 501(b) for an accounting and recovery of damages on behalf of the union, rather than for themselves as individuals. They are asking, in effect, that the defendant union officers be required to disclose any illegal campaign contributions, and repay to the union treasury any funds they unlawfully diverted into election campaigns. Nothing in the Campaign Act Amendments, or the legislative history, can be construed as having been intended to wipe out this beneficial protection of union funds which Congress created under the LMRDA.

Accordingly, the Court of Appeals erred in denying plaintiffs, and their union, the legal remedies expressly authorized in section 501(b) of the LMRDA.

II.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT, AND WITH DECISIONS OF OTHER CIRCUITS, PARTICULARLY THE DECISION OF THE DISTRICT OF COLUMBIA CIRCUIT IN THE BOYLE CASE.

In imposing a fiduciary obligation upon union officers to hold the union's money solely for the benefit of the union and its members, Congress wrote into section 501(a) of the LMRDA a specific caveat that:

> "A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy."

Notwithstanding this plain language of the statute the Court of Appeals selectively culled from the legislative history of the LMRDA certain isolated remarks made in floor debates, principally *by opponents of the fiduciary section*, as evidence that "Congress did not intend section 501 to hamper union financial contributions to . . . political organizations". 522 F.2d at 1165, and that ". . . so long as the expenditures were authorized in some fashion, plaintiffs can have no cause of action for breach of fiduciary duty". 522 F.2d. at 1166.

The same argument was made and rejected in *United States v. W.A. Boyle*, 482 F.2d. 755 (D.C. Cir. 1973), cert. denied 414 US 1076. There the president of the United Mine Workers of America was charged under section 501(c) of the LMRDA with having unlawfully converted union funds for purposes of contributions to candidates for federal office, and pleaded in defense that the transfer of the funds in question was authorized by the union's governing body, and was within the general powers granted to him under the union's constitution.

The Court of Appeals in a carefully reasoned opinion rejected this argument, and said:

> "In the instant case the use to which the money was converted could not have been lawful. As we have seen, the contribution of $5000 constituted a violation of section 610. Neither authorization by any union officer or body, nor any resulting

benefit to the union, would have rendered lawful transfer of general union funds to a federal political campaign. In *Pipefitters v. United States*, 407 U.S. 385 (1972) the Supreme Court specifically reserved the question whether even a unanimous vote of all union members could validate a union political contribution under § 610.

A similar defense was presented in *Union Electric Co. of Missouri v. Boehm*, 92 F. Supp. 177 (DC Mo., 1950), appeal dismissed 196 F.2d. 715 (8th Cir. 1951), a suit brought for the benefit of stockholders of a public utility company to secure an accounting by corporate officers with respect to funds expended by them for political contributions and other payments to influence legislation. The defendant officers contended that the payments in question were ordered by their superiors, the directors of a parent corporation, and thus no blame, legal or moral, attached to them. They also contended that the political and legislative expenditures were for the benefit of the corporation because over the course of the years involved they "saved" several million dollars to the company as the result of legislation successfully blocked. The court rejected this defense stating:

> "Defendants plead ratification and estoppel because the parts played by them in securing and dispensing company funds were directed by the managing officers of North American Company, parent company of plaintiffs. There is little or no competent evidence now in the record to sustain this defense, but assume [sic] it establishes defendants were executing orders of officers of the parent company ... *A corporation has no power to ratify acts which are illegal and immoral in the eyes of the law* " 92 F.Supp. 177, 181 (Emphasis added.)

In the present case the conclusion of the Court of Appeals that the political contributions made by defendants from union funds were authorized by the UAW Constitution is an unwarranted and unsupported assumption, which even if true could not constitute a valid authorization to make contributions to candidates for federal office in violation of federal law.

In *Pipefitters v. United States*, 407 U.S. 385, 33 L.Ed.2d. 11, 92 S.Ct. 2247 (1972) this Court held that although under 18 USC section 610 unions may establish and administer political funds derived from *voluntary contributions* of the union members, such funds must be separate and segregated, and may not be derived from membership dues and assessments. In the present case the CAP funds were derived directly from union membership dues required as a condition of employment under a compulsory union shop agreement.

CONCLUSION

If allowed to stand, the decision of the Court of Appeals will encourage and accelerate the already massive influence which labor unions exercise in federal elections. In practical effect it insulates union officers from any accountability to the dues paying members for illegal diversion of union money into political campaigns. It holds, contrary to *Boyle*, that if an authorization for political contributions can be inferred from the language of the union constitution or bylaws the union officers can rely on such authorization in making illegal contributions to federal candidates, and, in so doing, are relieved of their fiduciary obligations

under the LMRDA. The inevitable result will be the creation of an enormous loophole in the Corrupt Practices Act, and a further weakening of the protection which Congress intended for rank and file union members under the LMRDA.

For these reasons a writ of certiorari should issue to review the opinion and judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959

TITLE V—SAFEGUARDS FOR LABOR ORGANIZATIONS

FIDUCIARY RESPONSIBILITY OF OFFICERS OF LABOR ORGANIZATIONS

SEC. 501. (a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

(b) When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

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TITLE 18
UNITED STATES CODE ANNOTATED

§ 610. Contributions or expenditures by national banks, corporations or labor organizations

It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section

Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, and any person who accepts or receives any contribution, in violation of this section, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

For the purposes of this section "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

As used in this section, the phrase "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section; but shall not include communications by a corporation to its stockholders and their families or by a labor organization to its members and their families on any subject; nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and their families, or by a labor organization aimed at its members and their families; the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization: *Provided*, That it shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction.

APPENDIX B

In the
United States Court of Appeals
For the Seventh Circuit

No. 73-1829

BERNARD W. McNAMARA, ET AL.,
Plaintiffs-Appellants,

v.

ROBERT JOHNSTON, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 71-C-654
WILLIAM J. BAUER, *Judge.*

ARGUED SEPTEMBER 20, 1974—DECIDED SEPTEMBER 16, 1975

Before FAIRCHILD, *Chief Judge*, CASTLE, *Senior Circuit Judge*, and SPRECHER, *Circuit Judge.*

FAIRCHILD, *Chief Judge.* The primary question before us is whether rank and file union members can bring an action, pursuant to the Labor Management Reporting and Disclosure Act (popularly referred to as the Landrum-Griffin Act) §501, 29 U.S.C. §501 (1975), against union officers for breach of fiduciary duty when the officers, in accordance with general resolutions and the union's constitution, authorize and contribute union funds to political candidates and social causes.

I.

Plaintiffs, rank and file members of Local 558 of the International United Automobile, Aerospace and Agricul-

tural Implement Workers of America (UAW), are employed as production unit workers in the Fisher Body Plant of General Motors Corporation at Willow Springs, Illinois. Defendants are (or were) officials of the UAW or its subordinate bodies: Robert Johnston, Regional Director of UAW Region 4, and Chairman UAW Illinois State Community Action (CAP) Council; James Wright, Chairman of UAW Chicago Area CAP Council; Gerald Peterson, former Secretary-Treasurer of the Illinois CAP Council; Emil Mazey, International UAW Secretary-Treasurer; and Leonard Woodcock, International UAW President.

Plaintiffs, under a union shop agreement, pay monthly membership dues to UAW. The UAW constitution, as augmented by administrative instructions issued by the president of UAW International, requires that all local unions in Illinois, including Local 558, set aside a minimum of three percent of each member's monthly membership dues as a per capita payment to the UAW Illinois State Community Action Program (CAP). These CAP assessments are then spent to further activities and causes considered beneficial to union members and their families.[1]

On May 6, 1969, a majority of the members of Local 558 adopted a resolution objecting to the use of their dues money to support political and certain ideological causes and groups:

[1] In 1968, the UAW 21st Constitutional Convention authorized the International's Executive Board to establish the Community Action Program. An Administrative Letter from UAW International President, Walter P. Reuther, to all local unions, dated May 19, 1969, explains that:

> The object and purpose of the UAW Community Action Program (CAP) will be to develop, promote and implement policies and programs which will improve and enrich the quality of American life. In furtherance, thereof, the UAW Community Action Program will engage in community, civic, welfare, educational, environmental, cultural, citizenship-legislative, consumer protection, community services and other activities designed to improve the economic and social conditions of UAW members and their families and to promote the general welfare and democratic way of life for all people.
>
> In addition, the UAW Community Action Program may cooperate and work with community groups in the common effort to make a better life for all people where the programs and objectives of such groups have the same basic objectives as the UAW. Appendix at 5.

See UAW Constitution, Art. 23, §1. All UAW Local Unions must affiliate with CAP. UAW Constitution, Art. 37, §4.

> Resolution—the membership of UAW Local 558, party to a Union Shop, deny use of all or any part of their dues money in support of any political candidate, political organization, state or federal legislation, any organization or group engaged in violence or using the threat of violence, the illegal seizure or destruction of property, engaged in social disorder, promoting racial agitation, and any organization or group that preaches, promotes or identifies with Marxist or communist ideology. Furthermore, this membership does not authorize any person, organization or group to act as spokesman for UAW Local 558 on any political endorsement, legislative endorsement, social problem or movement of any kind unless or until the membership has clearly made such an endorsement by voting 68% in support by secret ballot using the dues check-off lists to verify voters eligibility.

Formal notice of the resolution was given to the UAW officials.

Despite this resolution, the defendants, it is alleged, contributed CAP funds to social causes and political candidates in state and federal elections.[2] After requesting the executive officers of Local 558 to bring legal proceedings and receiving no satisfaction, plaintiffs brought

[2] The complaint alleges that defendants, Johnston, Wright and Peterson, contributed CAP funds to Adlai Stevenson III, a candidate for United States Senate in 1970; various candidates for the United States House of Representatives in the 1970 Congressional elections; and various candidates for Illinois state office, including the Illinois General Assembly and Constitutional Convention in 1970. Defendants Mazey and Woodcock are specifically charged with contributing union funds to:

National Students Association (NSA)
Students for a Democratic Society (SDS)
Students Non-Violent Coordinating Committee (SNCC)
New Mobilization for Peace
Turn Toward Peace
Citizens Committee for a Nuclear Test Ban
National Committee for a Sane Nuclear Policy (SANE)
Americans for Democratic Action (ADA)
United World Federalists
Peace With Freedom Inc.
Dubois Memorial Committee
United States Committee for the UN
American Association for the UN
Confederate Spanish Societies
United States Committee for Democracy in Greece

this action asserting federal jurisdiction under §501(b) of the Labor Management Reporting and Disclosure Act, 29 U.S.C. §501(b).[3] Their complaint alleges that defendants breached the fiduciary duty imposed by §501(a) of that Act, 29 U.S.C. §501(a):

A. By failing to hold such money and property for the benefit of said labor organization and its members as required by Section 501(a) of the Labor Management Reporting and Disclosure Act (29 U.S.C., Section 501(a)).

B. By failing to manage, invest and expend said money and property in accordance with the constitution, bylaws and resolutions of said labor organization.

C. By ignoring said resolutions and dealing with the members of said labor organization as an adverse party, and by expending said moneys and property in a manner that conflicts with the interest of the members of said labor organization.

D. By paying and expending said money and property to and for candidates for Federal office in violation of the Federal Corrupt Practices Act, 18 U.S.C., Section 610.

The prayer for relief requests defendants to account for all monies received and expended in their capacity as union officials over the last five years; an injunction restraining defendants from contributing union monies to political and social causes; damages for all monies unlawfully diverted; and attorneys' fees and all other relief the court deems proper.

The UAW International moved to intervene, to provide counsel for defendants, and to dismiss the complaint. The district court granted the motion to intervene, 55 F.R.D. 441 (N.D. Ill. 1972), and dismissed the complaint for failure to state a claim, 360 F. Supp. 517 (N.D. Ill. 1973). This appeal followed. We affirm.

II.

After we heard oral argument, Congress passed and the President signed into law the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (Oct. 15, 1974), and the Supreme Court decided *Cort* v. *Ash*, 95 S. Ct. 2080 (1975). The parties have submitted supplemental briefs assessing the impact of this new law on this appeal, and we have concluded that the Campaign Act Amendments require the dismissal of plaintiff's complaint for lack of federal jurisdiction insofar as it requests that defendants be enjoined from contributing CAP funds to political campaigns for federal office under circumstances that allegedly violate the Federal Corrupt Practices Act, 18 U.S.C. §610.[4]

[3] The pertinent provisions of §501 provide:

(a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

(b) When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

[4] Section 610 provides:

It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for

The 1974 Campaign Act Amendments created a Federal Election Commission, §310(a), 88 Stat. 1280, and established an administrative procedure to process complaints alleging violations of 18 U.S.C. §610 after January 1,

[4] (Continued)

any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section.

Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, and any person who accepts or receives any contribution, in violation of this section, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

For the purpose of this section "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

As used in this section, the phrase "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any service, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section; but shall not include communications by a corporation to its stockholders and their families or by a labor organization to its members and their families on any subject; nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and their families, or by a labor organization aimed at its members and their families; the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization: *Provided*, That it shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction.

1975. §§314, 410, 88 Stat. 1284, 1304. The Amendments expressly vest the Commission with "primary jurisdiction with respect to the civil enforcement of" 18 U.S.C. §610. §310(b), 88 Stat. 1281. The legislative history of the measure confirms that henceforth the Commission is charged with the civil enforcement of §610.[5]

In *Cort* v. *Ash*, *supra*, a shareholder brought a derivative suit seeking to imply a private cause of action for injunctive relief and damages to remedy alleged violations of 18 U.S.C. §610 by corporate management in connection with the 1972 Presidential election. The action was filed prior to the 1974 Campaign Act Amendments, but the Court, invoking well established principles, nevertheless held that the Campaign Act Amendments "constitute an intervening law that relegates to the [Federal Election] Commission's recognizance respondent's complaint as a citizen or stockholder for injunctive relief against any alleged violation of §610 in future elections." 95 S. Ct. at 2087. The Court then examined those factors that are considered when determining whether a private remedy is implicit in a statute not expressly providing one and held that there was no federal cause of action for damages on behalf of a corporation for the alleged violation of 18 U.S.C. §610.

The first branch of *Cort* is dispositive of plaintiffs' claim for injunctive relief. We are aware that the instant case differs from *Cort* in that we are dealing with a labor organization, not a corporation, and that we are

[5] When presenting the Conference Report on S. 3044, the Campaign Act Amendments to the House, Representative Hays, Chairman of the House conferees stated:

In order to assure that civil suits are not misused in a partisan manner, and that the complex and sensitive rights and duties stated in the Act are administered expertly and uniformly, the Act provides that *all* civil complaints predicated upon or pertaining in any manner to Titles I and III of the Act or sections 608 through 617 of Title 18 United States Code shall be channeled to the [Federal election] Commission. . . . The delicately balanced scheme of procedures and remedies set out in the Act is intended to be the *exclusive* means for vindicating rights and declaring the duties stated therein. (Emphasis supplied.) 120 Cong. Rec., H10330 (daily ed. Oct. 10, 1974). See *Id.*, H10328 (remarks of Rep. Brademas); 120 Cong. Rec., S18525 (daily ed. Oct. 8, 1974) (remarks of Sen. Cannon); S. Conf. Rep. No. 93-1237, 93rd Cong., 2d Sess., 3 U.S. Code Congressional and Administrative News 5661-62 (1974).

asked to construe a statute, 29 U.S.C. §501, not to imply a cause of action, but we nevertheless reach the same result. Both the language and the legislative history of the Campaign Act Amendments indicate that Congress intended the statutory remedy before the Commission to govern all allegations of misconduct of this type in future federal elections. Accordingly, plaintiffs' complaint must be dismissed to the extent it requests injunctive relief for future violations of §610.

III.

Whether plaintiffs' complaint insofar as it seeks an accounting and damages for past CAP expenditures for partisan political activities and social causes and an injunction barring the expenditure of funds in the future for social causes and political activities not in violation of 18 U.S.C. §610 states a cause of action under 29 U.S.C. §501 is another matter.

UAW argues at the outset that plaintiffs have failed to comply with §501(b)'s requirement that an unsuccessful demand must be made upon the union or its officers to seek relief against the defendants before suit may be commenced.[6] Plaintiffs made a demand upon the officers of Local 558 but not upon the officers of the UAW International. While we tend to agree with UAW that a demand should have been made on the International, on the facts of this case we do not believe this omission defeats our jurisdiction. We have recognized the similarity between a §501 action and a shareholder's derivative suit and have noted that, as in the case of a derivative suit, a demand is not always necessary. *Hood* v. *Journeymen Barbers, Hairdressers, Etc.*, 454 F.2d 1347, 1354, n. 23 (7th Cir. 1972). Here, the UAW has consistently and vigorously argued that defendants were acting at all times in compliance with the union's constitution and duly adopted resolutions, and it is apparent that a demand upon the International for relief would have been futile. Under these circumstances, plaintiffs' failure to make such a request is excused. Cf. *Nussbacher* v. *Continental*

[6] See note 3, *supra*.

Illinois National Bank, No. 74-1142 (7th Cir., July 15, 1975).

Stripped of its essentials, plaintiffs' position on the merits is that union officers have a fiduciary duty under §501 to hold and spend union funds for the union members' benefit and that where members object to a particular expenditure and that expenditure is made, the officers, at least as to the objecting members, breach that duty. The UAW, in response, contends that Congress looked to the union's constitution, bylaws, and resolutions to define a union officer's fiduciary responsibilities and that so long as an officer expends funds without personal gain in compliance with these standards, there is no breach of any duty imposed by §501. We accept the union's construction of the statute as the correct statement of the law and reject plaintiffs' claim. See *Hood* v. *Journeymen Barbers, Hairdressers, Etc., supra*, at 1355.

Section 501's language and the legislative history of the Landrum-Griffin Act make it clear that Congress placed primary reliance on union rules and policies to establish the scope of a union representative's fiduciary obligations. The statute itself specifies that union officers act as fiduciaries not for each member but for the labor organization "as a group" and then charges that union officers must expend union money and property "in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder. . . ."

Landrum-Griffin was in part a response to the disclosure of official pilfering, union violence and the use of union office for personal profit during hearings held by the Select Committee on Improper Activities in the Labor or Management Field chaired by Senator McClellan. S. Rep. No. 187, 86th Cong., 1st Sess., 2 U.S. Code Congressional and Administrative News 2318 (1959). To expose conflicts of interest and stamp out embezzlement and self-dealing by union officials, the Act required unions to comply with certain reporting and disclosure requirements, established new crimes, and codified the fiduciary obligations of union representatives. See Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819 (1960).

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Senator McClellan, a principal congressional advocate of the fiduciary duties of union officials, argued during the Senate debates that union officials should only spend union funds for legitimate union purposes, and he equated these purposes with those "purposes which were proper under the [union's] constitution." 105 Cong. Rec. 6525 (1959) (Office of the Solicitor, U. S. Dep't. of Labor, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 1021 (1964), [hereinafter cited as Legislative History]). Senator Kennedy's remarks evince a like intent:

> Union officers will not be guilty of breach of trust under this section [§501] when their expenditures are within the authority conferred upon them either by the constitution and bylaws, or by a resolution of the executive board, convention or other appropriate body —including a general meeting of the members—not in conflict with the constitution and bylaws. 105 Cong. Rec. 17900 (1959) (Legislative History at 1075).

The House sponsors of section 501 entertained a similar view of a union officer's fiduciary obligations. H. R. Rep. 741, 86th Cong., 1st Sess., 81-82 (1959), 2 U.S. Code Congressional and Administrative News 2479-80 (1959). See *Cox, supra*, at 829. See also, 105 Cong. Rec. 15690 (1959) (remarks of Rep. O'Hara) (Legislative History at 1065).

In the present case, the UAW constitution (1970) contains ample authorization for the expenditures plaintiffs allege to be violations of §501. Article 2 sets forth some of the objectives of the UAW:

> ". . . to vote and work for the election of candidates and the passage of improved legislation in the interests of all labor." (Art. 2, §4)
>
> "To engage in legislative, political, educational, civic, welfare and other activities which further, directly or indirectly, the joint interests of the membership of this organization in the improvement of general economic and social conditions in the United States of America, Canada, and generally in nations of the world." (Art. 2, §5)

Article 23 establishes the objectives of the UAW's Community Action Program:

> "The UAW Community Action Program [CAP] shall engage in community, civic, welfare, educational, environmental, cultural, citizenship-legislative, consumer protection, community services and other activities to improve the economic and social conditions of UAW members and their families. . . ." (Art. 23, §1)

Other provisions authorize the expenditure of union funds to achieve the purposes set forth in the constitution. (Art. 2, §6(a); Art. 7, §2).

Additional support for the expenditure of CAP funds for political and social causes is found in the Proceedings of the UAW's Twenty-Second Constitutional Convention in 1970. At the convention, rank and file union representatives approved numerous resolutions authorizing the development of programs to promote civil rights, consumer, educational, and environmental causes as well as organizations advocating economic and social policies favorable to the union.[7]

Plaintiffs contend, however, that these general constitutional provisions and convention resolutions can provide no basis for the expenditures challenged here. They argue first that each expenditure must be specifically authorized by the union membership. But such a requirement would surely impose an impossible burden on the union. No widespread large institution, whether private association or public body, can function if each executive expenditure requires constituent approval.

Plaintiffs' alternative argument that the constitutional provisions and convention resolutions are general exculpatory clauses that are void under 29 U.S.C. §501(a) must also fail. Section 501 was intended to follow "the well-established distinction between conferring authority upon an agent or trustee, which is permissible and protects

[7] The Convention approved the UAW's Program Recommendations for CAP Councils which advocated the endorsement of political candidates, the establishment of educational programs, participation in community services, and cooperation with environmental and consumer groups. Proceedings of the UAW's Twenty-Second Constitutional Convention 68-70 (1970). Other resolutions, for example, urged CAP support for health care and welfare reform, *Id.* at 64; candidates representing labor's views in state and national elections, *Id.* at 108; Union contact with young American workers and students, *Id.* at 124; and measures to eliminate sex discrimination, *Id.* at 278-79.

him against liability, and attempting to excuse breaches of trust, which is here made void as against public policy." H. R. Rep. No. 741, 86th Cong., 1st Sess., 81-82, U. S. Code Congressional and Administrative News, 2480 (1959). Without doubt, the provisions and resolutions upon which the UAW relies fall within the former category of measures that confer authority.

More troublesome is plaintiffs' contention that the authorizations found in the UAW constitution and convention proceedings are void as against public policy inasmuch as they authorize violations of the Corrupt Practices Act, 18 U.S.C. §610. As noted above, the Supreme Court in *Cort* v. *Ash* declined to imply a federal civil remedy for damages in a shareholder's derivative suit on behalf of a corporation for violation of §610. In a footnote, however, the Court left open the question of whether a stronger federal interest in labor organizations may warrant a different result in a case where a union member brought a private action for a violation of §610 against the union's leadership. 95 S. Ct. at 2089, n. 13. Mindful of this disclaimer, we have carefully considered whether plaintiffs' allegation that defendants expended CAP funds in violation of §610 is properly asserted in and is sufficient to sustain this §501 action.

Since we are asked to construe a statute, and not to imply a civil remedy for the violation of a criminal statute, the legislative history of §501 should be accorded substantial, if not controlling, weight.[8] That history quite explicitly indicates that Congress did not intend §501 to hamper authorized union financial contributions to community and political organizations.[9] Senator McClellan, for example, assured Senator Kennedy that the proposed legislation would not interfere with COPE, the AFL-CIO's political organization:

> If the Senator has any thought that I am trying to interfere with COPE, that is not correct. There may be amendments to that point, and to deal with that direct question. However, I am not offering my amendment on the direct question of political contributions. Everyone knows my views on that subject, I assume. This is not a drive at that situation. It is a drive at the skulduggery of some leaders when they meet in executive sessions and pay off this one and pay off that one. 105 Cong. Rec. 6526 (1959) (Legislative History at 1023).

Senator Morse echoed this view when he stated that: "I have been assured that the fiduciary section will not prevent political contributions. I trust the courts will so interpret the language in the bill." 105 Cong. Rec. 17872 (1959) (Legislative History at 1071).

We have previously recognized that Congress drew upon the Restatement of Agency when it codified the common law of fiduciary obligations in §501. *Hood* v. *Journeymen Barbers, Hairdressers, Etc., supra*, 454 F.2d at 1355. Under that authority it is well established that an agent cannot be insulated from criminal liability by the fact that his principal authorized his conduct. But it is equally clear, and fundamental fairness requires, that as between agent and principal, an agent cannot be held liable for the use of the principal's property in an unlawful manner when it is reasonable to infer that the principal authorized the agent's conduct.[10] Compare Restatement (Second) of Agency §359A with *Id.* §19 comment *a*, §34 comment *g*, §411 comment *e*, and §412(2).

[8] Plaintiffs do not claim an implied cause of action. According to their brief, their "action here is founded on an express statutory grant of jurisdiction under 29 U.S.C. §501 . . . and was not premised upon the theory of an implied cause of action under 18 U.S.C. §610."

[9] Congress in §501 did not intend to regulate or limit the purposes for which a union may spend its money as long as expenditures were authorized by the union in some manner. Smith, The Labor Management Reporting and Disclosure Act of 1959, 46 Va. L. Rev. 165, 228 (1960); *Cox, supra*, at 828-29. Congress was fully aware that the interests of labor organizations are not confined to the terms and conditions of employment but rather extend to a broad range of social and economic issues as they effect their members off, as well as on, the job. *See generally* 105 Cong. Rec. 17900 (1959) (remarks of Sen. Kennedy) (Legislative History at 1075); 105 Cong. Rec. 14988 (1959) (remarks of Sen. Morse) (Legislative History at 1058).

[10] For this reason, *United States* v. *Boyle*, 482 F.2d 755 (D. C. Cir. 1973), *cert. denied*, 414 U.S. 1076 and *Anderson* v. *Vestal*, 79 LRRM 2755 (MD. Tenn. 1971) do not aid plaintiffs. *Boyle* was a criminal prosecution brought under 18 U.S.C. §610 and 29 U.S.C. §501(c), and evidence that the union authorized the defendant's violation of the law was irrelevant. In the instant case where the plaintiffs purport to represent the union membership in a civil action for breach of fiduciary duty such a showing is a complete defense. While *Anderson* was a civil case brought on behalf of the union under §501 and the union officers were charged with spending union funds in violation of §610, there was no showing there, unlike the present case, that the expenditures were authorized by some union resolution or policy.

It follows then that despite the alleged illegality of certain CAP expenditures, so long as the expenditures were authorized in some fashion, plaintiffs can have no cause of action on behalf of the union for breach of fiduciary duty.

We also deem it significant that the UAW has a rebate procedure whereby union members who object to CAP expenditures can recover a pro rata share of that part of their dues allocated to the CAP program.[11] Thus it cannot be said that the UAW leadership can arbitrarily spend CAP funds on political causes they alone favor at the expense of the views of the individual members. By the same token, union members such as plaintiffs who do not avail themselves of this rebate procedure appear at least tacitly to consent to CAP expenditures and to be in no position to claim a breach of trust.

Finally, on the particular facts of this case it is unnecessary to recognize a cause of action for the alleged violation of §610 to effectuate the purposes of the Corrupt Practices Act. Congress extended the Corrupt Practices Act to cover labor unions to minimize the influence

[11] Art. 16, §7 of the Constitution of the International Union, UAW (1970) provides:

Section 7. (a) Any member shall have the right to object to the expenditure of a portion of his dues money for activities or causes primarily political in nature. The approximate proportion of dues spent for such political purposes shall be determined by a committee of the International Executive Board, which shall be appointed by the President, subject to the approval of said Board. The member may perfect his objection by individually notifying the International Secretary-Treasurer of his objection by registered or certified mail; provided, however, that such objection shall be timely only during the first fourteen (14) days of Union membership and during the fourteen (14) days following each anniversary of Union membership. An objection may be continued from year-to-year by individual notifications given during each annual fourteen (14) day period.

(b) If an objecting member is dissatisfied with the approximate proportional allocation made by the committee of the International Executive Board, or the disposition of his objection by the International Secretary-Treasurer, he may appeal directly to the full International Executive Board and the decision of the International Executive Board shall be appealable to the Public Review Board or the Convention *Appeals Committee* at the option of said member.

This provision was apparently adopted in response to the Supreme Court's decisions in *Machinists* v. *Street*, 367 U.S. 740 (1961) and *Railway Clerks* v. *Allen*, 373 U.S. 113 (1963). See *Reid* v. *District Lodge No. 1093, UAW*, 479 F.2d 517, 520 (10th Cir. 1970), *cert. denied*, 414 U.S. 1076. Compare *Pipefitters* v. *United States*, 407 U.S. 385 (1972) with *United States* v. *CIO*, 335 U.S. 106, 149 (1948) (Rutledge, J., *concurring*).

of unions in federal elections and to prevent the use of union funds for political causes an individual member or a minority of the union might oppose.[12] *United States* v. *CIO*, 335 U.S. 106, 115 (1948); *Pipefitters* v. *United States*, 407 U.S. 385, 402-09 (1972). But allowing plaintiffs to proceed and possibly recover damages will not cure the impact of the alleged unlawful union contributions "upon an election already past." *Cort* v. *Ash*, *supra*, 95 S. Ct. at 2091. And, as for the protection of minority interests, the UAW rebate procedure appears to provide an adequate remedy.

18 U.S.C. §610 prohibits contributions or expenditures by corporations or labor organizations in an election at which federal officers are elected or nominated. This limitation suggests that Congress was focusing on the regulation of elections within its power as elections rather than on regulation of unions. The fact that §610 appears not to be designed as a regulation of union affairs makes it less reasonable and natural to interpret §501 to include a right of action for funds spent within the authorization of expenditures of the union, but in violation of §610.

Under these circumstances, we see no reason to deviate from Congress' apparent intention that §501 not be used as a means for dissident union members to challenge authorized expenditures.

IV.

Plaintiffs also assert that the district court erred in allowing UAW's motion to intervene. However meritorious

[12] Labor organizations were first included wtihin the coverage of the Corrupt Practices Act by the War Labor Disputes Act of 1943, 57 Stat. 167. The Labor Management Relations Act of 1947, commonly known as the Taft-Hartley Act, later made this expansion of the scope of §610 permanent. The parties have not directed us to and we have independently been unable to discover any indication in the legislative history of §610 that Congress intended to authorize a private cause of action for union members to police the use of union funds for political purposes. See S. Rep. No. 101, 79th Cong., 1st Sess. (1945). The relevant portions of the Taft-Hartley legislative history can be found in Subcomm. on Labor of Senate Comm. on Labor and Public Welfare, 93rd Cong., 2d Sess., Legislative History of the Labor Management Relations Act, 1947 (Comm. Print 1974). A single district court has recognized a private civil action for violation of §610, apparently without consideration of the implied remedy problem. *Barber* v. *Gibbons*, 367 F. Supp. 1102 (E. D. Mo. 1973).

this claim may have been at the time of the district court's decision, our resolution of merits of plaintiffs' complaint renders the point academic. We only note that in view of the union and union officials charged as defendants in a §501 suit, it is a rare case in which intervention should be allowed. See *International Brotherhood of Teamsters* v. *Hoffa*, 242 F. Supp. 246 (D. D.C. 1965); *Highway Truck Drivers Local 107* v. *Cohen*, 182 F. Supp. 608, 620 (E.D. Pa.), *aff'd*, 284 F.2d 162 (3rd Cir. 1960), *cert. denied*, 365 U. S. 833 (1961). For similar reasons, union officials charged as defendants in suits of this nature should retain independent counsel and bear the financial burden of their defense. Then, if they prevail, they may properly be reimbursed by the union for the costs of their legal defense. See *Holdeman v. Sheldon*, 311 F.2d 2, 3 (2d Cir. 1962), *aff'g*, 204 F. Supp. 890, 895 (S.D. N.Y.).

Accordingly, the judgment appealed from is affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-920

BERNARD W. McNAMARA, *et al.*,
Petitioners,

v.

ROBERT JOHNSTON, *et al.*,
Respondents.

BRIEF IN OPPOSITION FOR RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

The petitioners urged the Court below to expand federal jurisdiction by transmuting § 501(a) & (b) of the LMRDA [1] into a vehicle by which an individual union member can impose derivative damages on and secure injunctive relief against officers for certain ex-

---

[1] Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 USC § 411 *et seq.*, § 501, commonly known as the "Landrum-Griffin" Act.

penditures, even though those expenditures were authorized by the governing bodies of the organization.

Did the Seventh Circuit, in light of the legislative history of § 501 correctly *refuse* such an unprecedented expansion of federal jurisdiction, instead relegating the petitioners to remedies expressly provided by Congress elsewhere in the federal labor statutes, and by this Court in *Street* and *Allen*?[2]

COUNTERSTATEMENT OF THE CASE

Petitioners, plaintiffs below, seek *certiorari* from the unanimous decision of the Seventh Circuit, *per* Fairchild, C.J., affirming Judge William Bauer's dismissal of the Complaint for failure to state a claim.

The UAW's Constitution sets up UAW Community Action Progams (CAP).[3] In UAW Region 4, the Illinois State CAP Council has been established, along with a Greater Chicago Area CAP Council to administer these programs.[4] Subordinate bodies of the UAW,

[2] *Machinists* v. *Street*, 367 U.S. 740 (1961); *Railway Clerks* v. *Allen*, 373 U.S. 113 (1963).

[3] UAW Administrative Letter of May 19, 1969, attached as Exhibit A to the Complaint. The UAW has two parallel CAP structures—regular CAP, and V-CAP. UAW Voluntary CAP (UAW V CAP) is financed entirely by *voluntary* contributions *not* dues money and those contributions are expended for example on the making of federal political contributions. See *Pipefitters* v. *United States*, 407 U.S. 385. Regular CAP, here at issue, makes expenditures for other purposes and is financed by dues money, as explained below.

[4] The individual defendants herein are (or were) officers of the UAW and these CAP Councils. Robert Johnston is the Regional Director of the UAW Region 4, which includes Illinois. James Wright was Chairman of the UAW Chicago Area Community Action Program (CAP) Council. Gerald Peterson was the Secretary-

including Local 558, the petitioners' Local, were required to affiliate with the appropriate CAP Council.[5]

The regular UAW CAP structure is financed by 3% of monthly dues.[6] Expenditures are made by vote of the elected delegates to each CAP Council, or, between meetings, by the elected executive bodies of the Council. Any UAW Member who dissents from this use of his dues, has a right under Article 16 § 7 of the UAW Constitution to obtain a pro-rata rebate which includes the 3% of dues allotted to CAP, as well as other expenditures for political and ideological purposes.[7]

Disagreeing with the UAW Constitution, the petitioners filed suit under § 501(a) & (b) of the LMRDA, 29 U.S.C. § 501(a) & (b), seeking injunctive relief forbidding the organization's officers from spending funds for "partisan political activities" or "ideological causes" with which these particular plaintiffs disagree, and derivative damages from these officers for expenditures of this sort.[8]

Treasurer of the Illinois CAP Council. Emil Mazey is the Secretary Treasurer of the International Union, UAW. Leonard Woodcock is the President of the UAW. The UAW intervened as party defendant.

[5] UAW Administrative Letter of May 19, 1969, attached as Exhibit A to the Complaint. This requirement is now a part of the UAW Constitution, *see* Art. 37 §§ 1 & 2. All Locals are bound by the UAW Constitution, Art. 38 § 6. The Local 558 "nullification" resolution which the Petition emphasizes, pp. 3-4, was void *ab initio*.

[6] UAW Constitution, Art. 16 § 6.

[7] All that is required is a letter to the UAW's Secretary-Treasurer. *Reid* v. *UAW Local 1093*, 80 LRRM 2886, (ND Okla. 1972) aff'd 479 F. 2d 517 (10th Cir. 1973), *cert. den.* 414 U.S. 1076 (1973). *See: Railway Clerks* v. *Allen*, 373 U.S. 113, 123-124 (1963).

[8] Complaint, 2d & 3d prayers for relief and Count II ¶¶ 9-14.

The Complaint based jurisdiction solely upon the provisions of § 501(b) for alleged violations of the fiduciary requirements found in § 501(a) of the LMRDA. The Complaint, however, does not allege fiduciary violations by self-dealing, personal profit, fraud, misappropriation, or disobedience. Instead, it broadly attacks social expenditures as breaches of trust even where expressly authorized and commanded by the organization's constitution, and by directives of its governing bodies. Nor did the petitioners seek: an accounting under § 201(c) of the LMRDA, 29 U.S.C. § 431(c), the provision of the Act expressly tailored to that purpose;[9] a pro-rata rebate under the UAW Constitution, or its judicial equivalent, *Machinist* v. *Street,* 367 U.S. 740, 771-775 (1961), *Railway Clerks* v. *Allen,* 373 U.S. 113, 123-124 (1963); or criminal prosecution under § 501(c) of the LMRDA, 29 U.S.C. § 501(c), or the Corrupt Practices Act, 18 U.S.C. § 610, although they make unsupported conclusory assertions of criminal violation of the latter.

The Seventh Circuit affirmed Judge Bauer's dismissal of the Complaint, and rejected petitioners' assertion that, under § 501, an organization's officers are derivatively liable for civil breach of fiduciary duty simply because money is spent with authorization, but over the objection of some member of the organization.

[9] This is particularly curious in light of the tenor of the Petition, p. 7, where the petitioners suggest that their principal goal is an accounting. But the right to information is not at issue here. The Seventh Circuit held that the petitioners failed to state a claim under § 501. Accounting is a matter of remedy under § 501(b). Of course, that remedy is available only if a claim is stated first. Plaintiffs' stress on an accounting, therefore, begs the question. If information were their object, they would have pleaded § 201(c) and tried to meet that section's "just cause" requirement. They did not.

The Court below concluded, in conformity with the common law, that, absent adverse dealing, personal gain, disobedience, or the like, an officer's civil fiduciary duties must be tested by the authorization of his principal—here, the union "as a group," § 501(a), rather than some particular objecting member. 522 F. 2d at 1163. The Seventh Circuit grounded this conclusion, not only on the language of § 501, but also on careful examination of the legislative history of the LMRDA. 522 F. 2d at 1163, 1165.[10] Against this background, the Seventh Circuit examined *specific* provisions in the UAW Constitution and resolutions of the UAW Convention at length. 522 F. 2d at 1164. Finding adequate authorization in these, the Court below affirmed the District Court, refusing to permit a broad extention of federal jurisdiction.[11]

[10] As the Court below points out, there is a well-established distinction between conferring authority on an agent and attempting to excuse breaches of trust. 522 F. 2d at 1164 (quoting express legislative history).

[11] The Court below

> "deem[ed] it significant that the UAW has a rebate procedure whereby union members who object to CAP expenditures can recover a pro-rata share of that part of their dues allocated to the CAP program. Thus it cannot be said that the UAW leadership can arbitrarily spend CAP funds on political causes they alone favor at the expense of the views of the individual members. By the same token, union members such as plaintiffs who do not avail themselves of this rebate procedure appear at least tacitly to consent to CAP expenditures and to be in no position to claim a breach of trust." [522 F.2d at 1166.]

In *Street* and *Allen* this Court struck a delicate balance between the right of the majority to political and community activities, as against the right of dissenting individuals not to finance those activities. In both cases, the Court refused to enjoin the operation of union security provisions and instead held that individuals could recover a pro-rata rebate of dues spent over their objection. And the *Allen* Court urged unions to provide their own rebate

ARGUMENT

The Seventh Circuit rejected the petitioners' arguments through the following straight-forward, restrained analysis:

Congress, as evidenced by both the language of § 501 (a) and (b) and its legislative history, intended that section to incorporate the common law approach to fiduciary responsibility. The Complaint is devoid of allegations of adverse dealing, personal gain, disobedience of the principal and other such conduct. In the UAW's case, there is specific authorization from the principal for the conduct of which petitioners complain. So, under the established rules of agency, the agent officers cannot be held derivatively liable for the use of the organization's property, even in an unlawful manner, since the principal authorized the agent's conduct.[12]

Petitioners concede here, as they did in the Court below,[13] that this is purely a § 501(b) case:

> "It should be noted that plaintiffs here are not asserting any implied private cause of action to

procedures. See: 373 U.S. at 123-124; *Marker* v. *Shultz*, 485 F. 2d 1003, 1005 (D.C. Cir. 1973). The UAW was the first to provide a rebate system, now judicially approved. *Reid* v. *UAW Local 1093*, 479 F. 2d 517 (10th Cir. 1973), *cert. den.* 414 U.S. 1076 (1973). Here the petitioners did not use that rebate procedure. 522 F. 2d at 1166.

The Seventh Circuit therefore correctly refused to distort § 501 (a) & (b) into an unrestricted license to expand derivative actions which undo *Street* and *Allen*.

[12] Indeed *Johnson* v. *Nelson*, 325 F. 2d 646 (8th Cir. 1963), and *Pignotti* v. *Sheet Metal Workers*, 477 F. 2d 825 (8th Cir. 1973), *cert. den.* 414 U.S. 1067 (1973) suggest that if the officials had refused to make authorized expenditures for social or political purposes, the disobedience would subject them to suit under § 501(b).

[13] 522 F. 2d at 1165 n. 8.

> enforce 18 U.S.C. section 610. Their action seeks relief under 29 U.S.C. section 501(b) . . ." [Petition p. 10]

This concession, without more, makes irrelevant *Cort* v. *Ash*, 422 U.S. 66 (1975), the first question presented by the Petition, and the entire discussion at pp. 8-10 of the Petition. *Cort* unanimously rejects the attempt of stockholders, seeking both injunctive relief and derivative damages, to imply a private cause of action against corporate officers into 18 USC § 610. As the instant petitioners disavow any implied private action to enforce § 610, *Cort* is not germane. Their case must stand or fall strictly on § 501(a) & (b). The Seventh Circuit amply demonstrated that it falls.

Petitioners' arguments for granting the writ therefore comes down to two assertions: (i) that the federal courts have misunderstood the legislative history of § 501, and (ii) that this Court should find a conflict between the instant civil case and the criminal case of *U. S.* v. *Boyle*, 482 F. 2d 755 (D.C. Cir. 1973), *cert. den.* 414 U.S. 1076 (1973). Petitioners offer nothing else. We shall treat with these claims in order:

I

There is no reason for this Court to address the language and legislative history of § 501. The Circuits are in agreement.[14] The Seventh Circuit's reasoning here rests on a few unexceptionable principles:

[14] *E.g.*, *Hood* v. *Barbers*, 454 F. 2d 1347 (7th Cir. 1972); *Johnson* v. *Nelson*, 325 F. 2d 646 (8th Cir. 1963); *Pignotti* v. *Sheet Metal Workers*, 477 F. 2d 825 (8th Cir. 1973), *cert. den.* 414 U.S. 1067 (1973); *Phillips* v. *Osborne*, 403 F. 2d 826 (9th Cir. 1968).

The express language of § 501(a) imposes a fiduciary duty in favor of the union "as a group." This disposes of the petitioners' argument that disregard for the wishes of any objecting member breaches the duty.

Congress intended § 501 to impose on union officers the common law standards of fiduciary duty, therefore, in the absence of adverse dealing, personal gain, or disobedience of the principal, the test is authorization by the principal. Allegations of such misconduct are absent here, so the Court below quite properly turned to the matter of authorization, delving into a body of union provisions and resolutions unique to the UAW, but of no general significance, and on the basis of these, determined that the expenditures were authorized.

And, finally, the legislative history of § 501 disavows any intent to prohibit union involvement in politics. This is not only patent in Senator McClellan's remarks [15] but a union's right to do so has been repeatedly confirmed by this Court.[16] This answers the claim that political spending is a *per se* violation of fiduciary duty.

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[15] The Court below properly paid particular heed to the remarks of Senator McClellan, the chief proponent of the fiduciary responsibility provision, who assured Senator Kennedy that § 501 was not intended to interfere with COPE. 522 F. 2d at 1165. Petitioner's assertion, p. 11, that the Seventh Circuit relied on the opponents of § 501 is flatly wrong.

[16] *E.g., Pipefitters* v. *United States*, 407 U.S. 385 (1972); *Railway Clerks* v. *Allen*, 373 U.S. 113 (1963); *Machinists* v. *Street*, 367 U.S. 740 (1961); *U.S.* v. *CIO*, 335 U.S. 106 (1948). The commentators agree: A. Cox, *International Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 828-9 (1960); and R. Smith, *The Labor Management Reporting and Disclosure Act of 1959*, 46 Va. L. Rev. 165, 228 (1960).

The Seventh Circuit's reading of § 501 and its history, thus, merely confirms well-settled law. The lower Courts ultimate conclusions, while based on those interpretations, turn on a body of UAW authorizations of no general significance beyond this case.

II

Last, the Seventh Circuit's discussion of *U.S.* v. *Boyle*, 482 F.2d 755 (D.C. Cir. 1973), *cert. den.* 414 U.S. 1076 (1973), is grounded on long established principles. 522 F.2d at 1165 n.10. *Boyle* was a criminal case under a distinct provision, § 501(c).[17] *Boyle* held that authorization cannot insulate an agent from criminal liability. But in this civil case, as between agent and principal, "fundamental fairness requires that an agent not be held for the use of the principal's property in an unlawful manner when it is reasonable to infer that the principal authorized the agent's conduct." 522 F.2d at 1165. Thus, while authorization is not a defense to criminal liability, it will defeat civil recovery by the principal. In so holding, the Seventh Circuit followed the common law agency rules set out in the Restatement (Second) of Agency. 522 F.2d at 1165-1166.

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[17] Although part of § 501, § 501(c) contains its own recitation of duty; it does not rely on the recitation of duty in § 501(a), as does § 501(b).

CONCLUSION

For the foregoing reasons, the Court should deny the Petition.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-920

BERNARD W. McNAMARA, *et al.*,

Petitioners,

v.

ROBERT JOHNSTON, *et al.*,

Respondents.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondents' opposition brief presents the argument that plaintiffs are not entitled to the statutory relief provided for under section 501(b) of the LMRDA because the United Auto Workers Union has established a rebate procedure whereby individual union members who object to political expenditures from union funds can request a proportionate rebate of their union dues. In this connection respondents' brief makes reference to the *obiter dictum* comment of the Circuit Court that ". . . union members such as plaintiffs who do not avail themselves of this rebate procedure appear tacitly to

consent to CAP expenditures and to be in no position to claim a breach of trust". 522 F.2d at 1166.

This argument reflects a complete misunderstanding and misrepresentation of the purpose of the plaintiffs' action here. The plaintiffs here are not seeking to obtain a refund of any money for themselves as individuals, but rather are seeking a statutory remedy under 29 USC section 501 to secure an accounting and appropriate relief "for the benefit of the labor organization and its members". The suit which they have filed is a suit on behalf of their union, UAW Local 558, and its entire membership, to prevent diversion of union funds into political campaigns and ideological causes contrary to the objections of an overwhelming majority of the union's members expressed by a referendum vote of the full membership of the union.[1]

The text of the referendum resolution adopted by the full membership of Local 558 is set out in the opinion of the Circuit Court. (522 F.2d at 1159; Petition, Appendix B, page 3c.) This resolution reads:

> "Resolution – the membership of UAW Local 558, party to a Union Shop, deny use of all or any part of their dues money in support of any political candidate, political organization, state or federal legislation, any organization or group engaged in violence or using the threat of violence, the illegal seizure or destruction of property, engaged in social disorder, promoting racial agitation, and any organization or group that

[1] This is an entirely different situation than that presented in *Machinists Union v. Street*, 367 US 149 (1961), and *Railway Clerks v. Allen*, 373 US 113 (1963), where the plaintiffs were held by this Court to be suing only on behalf of themselves as individuals to obtain relief from compelled payment of union dues.

> preaches, promotes or identifies with Marxist or communist ideology. Furthermore, this membership does not authorize any person, organization or group to act as spokesman for UAW Local 558 or any political endorsement, legislative endorsement, social problem or movement of any kind unless or until the membership has clearly made such an endorsement by voting 68% in support by secret ballot using the dues check-off lists to verify voters eligibility.

After the respondent union officers acted in defiance of this unequivocal directive of the union members, the members sought recourse under section 501(b) to secure an accounting and to restrain continued violations, which included political campaign contributions to candidates for federal office in violation of 18 USC section 610. The respondent union officers have at no time disclaimed that they make these illegal contributions from union funds, but assert that they are authorized under general clauses contained in the UAW Constitution and convention proceedings. The Circuit Court's holding that the illegal contributions are sanctioned by the union Constitution and convention proceedings, and thus do not involve a breach of fiduciary duty by the union officers under section 501 of the LMRDA, is in direct conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *United States v. Boyle*, 482 F.2d 755; cert. denied, 414 US 1076, 38 L. Ed. 2d 438 (1974).

The UAW also argues that the *Boyle* case is inapposite because although authorization by the principal is no defense in a criminal case, "it will defeat civil recovery by the principal." (Brief p. 9). This argument, which is of dubious validity at best, is

extraneous and irrelevant in the present situation. Section 501(a) of the LMRDA was adopted for the purpose of protection of the interests of union members, not the union governing body, and expressly provides that: "A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person [officer, agent, shop steward or other representative] of liability for breach of the duties declared by this section shall be void as against public policy."

As a further ground for its decision the Circuit Court held, (citing *Cort v. Ash*, 422 US 66, 45 L.Ed. 2d 26 (1975)), that the Federal Election Campaign Act Amendments of 1974 vested the Federal Election Commission with primary jurisdiction respecting civil enforcement of 18 USC section 610, and hence requires dismissal of plaintiffs' complaint for lack of federal jurisdiction in the district courts to enjoin illegal contributions to political campaigns for federal office. 522 F.2d at 1162.

This ground of the Circuit Court's decision is clearly subject to reversal by virtue of the subsequent decision of this Court in *Buckley, et al. v. Valleo*, No. 75-436, decided January 30, 1976, holding that the Federal Election Commission was improperly constituted under the statute, and that the provisions of the Act vesting in the Commission primary responsibility for conducting civil litigation in the courts of the United States for violations of 18 USC section 610 are in conflict with Article II, cl. 2, section 2, of the Constitution.

CONCLUSION

This case clearly presents important questions of law concerning the protection of the rights of union members, and enforcement of the fiduciary obligation of union officers to use union funds solely for the benefit of the union and its members. In section 501(b) of the LMRDA Congress expressly authorized the action brought by plaintiffs here. The Circuit Court was clearly in error in holding that remedies authorized under section 501(b) are precluded by the Federal Election Campaign Act Amendments of 1974 and by general exculpatory clauses contained in the UAW Constitution and convention proceedings.

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